Supreme Court of the United States

IN THE MATTER

OF

THE PETITION OF GEORGE F. UNDERHILL, FOR A WRIT OF CERTIORARI, &C., TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

SALTER S. CLARK,
Of Counsel.

Supreme Court of the United States.

In the matter of the petition of George F. Underhill for Writ of Certiorari, &c., in the case of

GEORGE F. UNDERHILL,
Plaintiff,
against
JOSE MANUEL HERNANDEZ,
Defendant.

BRIEF FOR PETITIONER.

Point I.

The case involves important principles of International Law.

The plaintiff, an American citizen, is suing civilly for torts alleged to have been committed against him by the defendant in Bolivar, Venezuela. Upon the trial before a jury the Court directed a verdict against plaintiff after the presentation of his evidence; and that judgment has been affirmed by the Circuit Court of Appeals. The acts complained of were committed during the progress of the

revolutionary troubles of Venezuela of 1892; and were all committed prior to any recognition by the United States Government, or by any government, of the Revolutionary Party in Venezuela, either as the sovereign authority there, or as having belligerent rights. The decision of the Circuit Court of Appeals, denying the right of action, is based upon the ground that the final success of the Revolutionary Party had a retroactive effect to legalize all the acts of the Revolutionists, without reference to any recognition of belligerent rights by this country; that, therefore, the acts of the defendant were done under color of sovereign right; and that the private party, though injured thereby, had no right of action therefor in the courts of a foreign country; and that his remedy, if any, was confined to the courts of Venezuela, or the channels of diplomacy.

The main facts of the case are set out in the petition, with references to the record, and therefore need not be rehearsed here. The opinion of the Circuit Court of Appeals is annexed to the petition.

Among the questions involved are:

(1). The status of an American citizen living in a South American State during one of its oft-recurring revolutions. If an insurrectionary leader there (either adventurer or patriot) captures the town, what authority does that give him over the inhabitants? Must the American citizen take the chances of which side is going to succeed?

(2). If the insurrectionary leader commits tortious acts against the American citizen—acts in no way justified by International Law or the rights of war—has the citizen any remedy in court?

(3). If so, does his remedy lie in the courts of that country, or the courts of his own country, or both?

(4). Can the courts of our country recognize the existence of a civil war in a foreign country prior to its recognition by the Executive Department of our Government? Have they jurisdiction to say whether an armed conflict in a foreign country is a civil war or an insurrection?

(5). Does the success of a revolutionary movement justify retroactively, legally, in the courts of all nations, all prior acts of the revolutionists?

(6). Has the recognition of a new government by the Executive Department any retroactive effect, so as to necessarily place all its acts prior to recognition uuder the protection of belligerent rights? In other words, is it not in the power of a government to recognize the result of a revolution without approving the methods that brought it about?

(7). Can a defendant escape civil liability, at least in the courts of a foreign country, by simply *claiming* to have done his misdeeds as a part of a revolutionary movement?

(8). Where is the line to be drawn between the adventurer acting independently and the soldier or general acting as part of an organized revolutionary movement—that is, between the plunderer and the man making legitimate war?

(9). Does the political character of the defendant's act save him from suit in a foreign court?

Point II.

There is a conflict of authority upon the point involved between different circuit courts of appeal.

The point involved is, that the success of a revo-

lution, and recognition of the new government, have a retroactive effect to make the successful party sovereign from the beginning, and justify all its prior acts, irrespective of any recognition of belligerent rights. The decision in this case of the Circuit Court of Appeals involves two points: (1). That the acts of a foreign sovereign or his agents, acting under clear sovereign rights, cannot be questioned in a foreign tribunal; and (2). That the success and final recognition of the revolutionary party legalizes its prior acts irrespective of any recognition of belligerent rights. The able opinion of the Court below is directed almost wholly to the first point, and, no doubt, that is law. The second point is also necessary to the decision, but I contend is not law. It is expressed (near the end of the decision) in the following language:

> "The acts of the defendant as a military commander of the revolutionary forces in the civil war in Venezuela, although performed before the revolution became successful, are sheltered by the same immunities that would surround them if they had been performed subsequently."

The cases particularly in conflict with this Court upon this point are:

> The *Itata*, 56 Fed. Rep., 505 (Ninth Circuit, 1893);
> U. S. *v.* Trumbull, 48 Fed. Rep., 99;
> *Ambrose Light*, 25 Fed. Rep., 408.

The *Itata* case was that of a vessel belonging to the Congressional Party of Chile, which was seized here as violating our neutrality laws. The case was decided upon the ground that what the vessel did would not have been a violation of our neutrality laws in any case; but upon the question as to whether the Congressional Party of Chile was at that time a sovereign state, although it afterward succeeded, and was recognized by the United States, The Court held:

> "The law is well settled that it is the duty of the courts to regard the status of the Congressional Party in the same light as they were regarded by the executive department of the United States *at the time the alleged offenses were committed* (quoting cases). It being admitted that the Government of the United States, at the time of the commission of the alleged unlawful acts, did not recognize the Congressional Party as being entitled to any belligerent rights, it would seem to follow that it was within the power of the Government at its option to treat the party as pirates if the facts warranted and justice and policy so required."

In the Trumbull case, which was the *Itata* case in the court below, the decision says:

> "It is beyond question that the status of the people composing the Congressional Party *at the time of the alleged offense*, is to be regarded by the Court as it was then regarded by the political or executive department of the United States. This doctrine is firmly established" (quoting cases).

In the *Ambrose Light* case, the vessel had been commissioned by some insurgents operating against the United States of Colombia, and had been captured as a pirate by some Americans and brought into an American port for condemnation. The Court held that there had been recognition, by our Government, of belligerent rights in the insurgents at the time of the capture, and that that was the only thing that saved the vessel from liability as a pirate. The Court says:

> "The liability of the vessel to seizure as piratical turns wholly upon the question whether the insurgents had or had not obtained any *previous* recognition of belligerent rights. * * * Private warfare is unlawful. International law has no place for rebellion, and insurgents have strictly no legal rights as against other nations until recognition of belligerent rights is accorded them."

(The Court then refers to the rule that such recognition belongs to the executive, and not the judicial, department.)

I cite the *Ambrose Light* case, though it was decided in the District Court, because it contains so full and able a discussion of the principles and of the authorities, and because it is adopted as authority by the Circuit Court of Appeals in the *Itata* case.

The proposition that it is for the executive, and not the judicial, department to inquire and decide whether civil war exists in a foreign country, and whether revolutionists have belligerent rights, was long ago established by this court, and the cases make no distinction between success and non-success.

Rose *v.* Himely, 4 Cranch., 241;
U. S. *v.* Palmer, 3 Wheat., 601;
Gelston *v.* Hoyt, 3 Wheat. ,246;
Gelston *v.* Hoyt, 13 Johns., 561;
Kennett *v.* Chambers, 14 How., 38;
Freeland *v.* Williams, 131 U. S., 405.

In Kennett *v.* Chambers (quoted above), a contract, attempted to be made between a citizen of the United States and an inhabitant of Texas, was held void because Texas was at that time in revolt against Mexico, and the Court held that the subsequent acknowledgment of the independence of Texas did not affect the question.

Point III.

Recognition of the existence of a new State is not equivalent to a recognition of its having had belligerent rights during the struggle for its establishment.

It may be that a foreign State can, by definite

action, recognize retroactively belligerent rights so as to cover all the prior acts of the successful party. But the United States did not do so in this case. It merely recognized the existence of the new State when it was established.

The opinion herein states:

> "After the recognition of the new government by the United States, the courts of this country must accord to those who, throughout the progress of the Civil War, acted as the agents of the people of Venezuela, the position of official representatives of the State."

I submit that the distinction between recognition of a new State and recognition of belligerent rights has been overlooked here. In modern wars foreign States have been quick, in cases of civil war, to recognize belligerent rights. In our own Civil War the great nations of the world had done so within a month of the firing upon Sumter.

But with uncivilized and half civilized nations all around us, cases may well arise where we may think it policy to recognize a new State as an accomplished fact, after it has been accomplished, and yet withhold our recognition of any belligerent rights on the part of the party that succeeded. To recognize new States tends to the peace of nations; to recognize belligerent rights, is a license to make war. We might well recognize as *de facto* ruler some Haytian or Russian or Chinese usurper, and yet preserve to our courts their jurisdiction to judge upon the private wrongs committed by his agents in accomplishing his nefarious purposes.

When a people, or a part thereof, revolt from their constituted authorities, they will, of course, if they succeed, justify to themselves, in their own courts, all the acts of their own party; but it is another thing altogether to ask the world to approve. Are we, a Christian nation, to be compelled to justify all the acts of South American or West

Indian adventurers, black or white, because they have had the good fortune to succeed and make themselves supreme for a short year or two? The promulgation of such a rule would encourage, not check, the tendency to revolution so prevalent there. And to say that the citizen still has his remedy in the native courts, or by diplomacy, is illogical; for if the successful revolutionist, prior to success, represents the sovereignty of his nation, then he will have the right to make war and the private party will have suffered no wrong.

If recognition of a new State carries with it a recognition of prior belligerent rights, then all the acts of the other party, the party rebelled against, are without legality. The result is, upon that theory, that if a suit is brought in our courts, prior to success, one party are pirates, robbers and murderers; but if, upon the same state of facts, suit is brought after success, the other party are all pirates, robbers and murderers. What are we to do with a judgment obtained or paid prior to success, where the party afterwards succeeds?

The decision of the Court below here makes a revolutionary party to have been sovereign from the beginning of the struggle; and yet, during all that time, there will have been another party indisputably sovereign at the time and treated as such by our own Government and in our courts.

Let the revolutionist understand that he is acting wholly without right until he can obtain some recognition of belligerent rights. Let him know that if caught in a foreign country, although he cannot be punished as a criminal, yet the courts of the foreign country will hold him responsible civilly to private parties. This will teach him to be slow to rush to arms against his constituted government. And if in any case he is held liable where his party shall have succeeded, or shall thereafter succeed, it is always in the power of his government

to reimburse him, as Gen. Jackson was reimbursed for the fine he had to pay at New Orleans for having overstepped the bounds of legal right.

The case of Williams *v.* Bruffy, 96 U. S., 176, is referred to in the Court below as supporting the theory that success of a revolutionary party justifies its prior acts. It does not go so far. The question there was whether a legislative act of the Confederate Congress confiscating certain debts due Northerners was valid. The Court held that although the United States had recognized belligerent rights in the Confederacy, yet the Confederacy was not a *de facto* government and its acts of legislation were not valid. It was only with reference to such *de facto* governments as that of Cromwell in England and the State Governments during our revolution, that the Court said (*obiter*) that their acts, from the commencement, would have been upheld as those of an independent nation. Yet the Confederacy had a government and exclusive authority over certain sections, which the revolutionary party of Venezuela never had until it was recognized by the United States.

Point IV.

The defendant was not acting as a part of an organized revolutionary army. but was acting independently.

There was no proof in the case that he had a commission from Crespo; or that there was any organized revolutionary army as a unit; or that he was acting in subordination to any general system. Crespo was recognized by our Government, not Hernandez.

But this point it would probably be more appropriate to urge, if the certiorari be granted.

Point V.

There should be a certiorari to the United States Circuit Court of Appeals for the Second Circuit, to bring this case before the Supreme Court.

Respectfully submitted,

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